No. 79-276

In the Supreme Court of the United States

October Term, 1979

W. JASON MITAN,

Petitioner,

vs.

ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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August 17, 1979

The Scheffer Press, Inc.—(312) 263-6850

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The petitioner W. Jason Mitan respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Illinois entered in this proceeding on January 12, 1979.

OPINION BELOW

The opinion of the Supreme Court of Illinois, which is reported at 75 Ill.2d 118 (1979), appears in the Appendix hereto.

JURISDICTION

The judgment of the Illinois Supreme Court was entered on January 12, 1979. A timely petition for rehearing was denied on March 30, 1979. A timely application for extension of time to file this petition for writ of certiorari was granted on June 15, 1979 and petitioner's right to file this petition was extended to August 20, 1979. The petition is being filed prior to August 20, 1979. The Court's jurisdiction is invoked under and pursuant to 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Whether in attorney disciplinary proceedings a state supreme court is required to assure compliance with the requirements of the Due Process Clause of the Fourteenth Amendment.

2. Whether in complying with the Due Process Clause of the Fourteenth Amendment a state supreme court in administering attorney disciplinary proceedings may:

a) fail to enforce the rules of its own disciplinary agencies, more specifically a rule requiring a hearing within 90 days after the service of a complaint;

b) fail to enforce its own rule requiring all complaints be voted on by an Inquiry Board;

c) allow an attorney to be tried and convicted for violation of an Illinois State Bar Association Regulation which the court had previously held inapplicable;

d) require an attorney to comply with civil discovery rules;

e) fail to treat the trial as adversary and quasi-criminal in nature.

CONSTITUTIONAL PROVISIONS AND RULES

Section 1 of the Fourteenth Amendment to the Constitution of the United States contains, in relevant part, the following provision:

> "No State shall * * * deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Illinois Supreme Court Rule 751 provides, in relevant part, as follows:

> "The registration of, and disciplinary proceedings affecting members of the Illinois Bar shall be under the administrative supervision of an Attorney Registration and Disciplinary Commission. * * *
>
> "The Commission shall have the following duties:
>
> (a) To make rules for disciplinary proceedings not inconsistent with the rules of this Court * * *"

Illinois Supreme Court Rule 753 provides, in relevant part, as follows:

> "(a) *Inquiry Board*—There is hereby established an Inquiry Board which shall consist of not less than 21 members of the bar of Illinois. The members of the board shall be appointed by the Commission to serve annual terms as commissioners of the Court. * * *
>
> "The Inquiry Board shall inquire into and investigate matters referred to it by the administrator. The board may also initiate investigations on its own motion and may refer matters to the administrator for investigation.
>
> "After investigation and consideration, the Inquiry Board shall dispose of matters before it by voting to dismiss the charge, to discontinue an investigation undertaken on its own motion or to file a complaint with the Hearing Board.
>
> "(b) *Filing a Complaint*—A complaint voted by the Inquiry Board shall be prepared by the adminis-

trator and filed with the Hearing Board. The complaint shall reasonably inform the attorney of the acts of misconduct he is alleged to have committed."

Rule 8.1 of the Rules of the Attorney Registration and Disciplinary Commission (Ch. 110 A Ill.Rev.Stat. (1977) § 8.1) provides as follows:

> Hearing Within Ninety Days after Filing of Complaint. Except in extraordinary circumstances, the hearing on the complaint shall commence before the Hearing Panel no later than 90 days after service of the complaint upon the respondent.

Illinois State Bar Association Disciplinary Rule 1-101(A) provides as follows:

> "A lawyer is subject to discipline if he has made a materially false statement in, or if he has deliberately failed to disclose a material fact requested in connection with, his application to the bar."

STATEMENT OF THE CASE

Petitioner was admitted to the Illinois bar in May of 1974.

In August of 1975 the Administrator of the respondent Commission commenced an inquiry into the truthfulness of petitioner's application for admission to the bar. In February of 1976, the Administrator filed a formal complaint which was properly voted on by the Inquiry Board. The Administrator failed to set a hearing on this complaint within the 90 days required by the respondent's Commission Rule 8.1 which provides that a hearing must commence within 90 days after service of the complaint. On petitioner's motion the complaint was dismissed for failure to commence hearing within the required time, however the dismissal order indicated it was being entered without prejudice to the right to file a new complaint.

A second complaint was filed. The second complaint was not however voted by the Inquiry Board as required by Supreme Court Rule 753(a). Petitioner objected to the filing of a second complaint on the ground that the earlier dismissal was conclusive and on the further ground that the second complaint had not been voted on by the Inquiry Board. These objections were overruled.

Prior to the hearing petitioner was, in accordance with applicable Supreme Court Rules, directed to comply with civil discovery rules which required his production of personal documents. Petitioner did not personally appear before the Commission at its hearing on the second complaint adhering to his contention that the Commission lacked jurisdiction. His counsel, however, did attend.

The respondent Commission recommended petitioner's disbarment. The Illinois Supreme Court affirmed that recommendation and ordered the disbarment of the petitioner. The facts upon which such disbarment were predicated are fully set forth within the Illinois Supreme Court opinion (Appendix 1).

No complaint was made concerning any non-professional activity on petitioner's part, nor of any action of any nature taken by him subsequent to his being licensed as a lawyer.

This petition for certiorari seeks review of the disbarment order.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING PROBLEMS CONCERNING THE DENIAL OF BASIC DUE PROCESS RIGHTS BY STATE COURTS IN THE CONDUCT OF ATTORNEY DISCIPLINARY PROCEEDINGS AND CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER FEDERAL COURTS IN FAILING TO TREAT ATTORNEY DISCIPLINARY PROCEEDINGS AS ADVERSARY QUASI-CRIMINAL PROCEEDINGS

A. THE RIGHT OF A STATE SUPREME COURT TO DISCIPLINE ATTORNEYS IS NOT ABSOLUTE, BUT RATHER IS SUBJECT TO COMPLIANCE WITH DUE PROCESS RIGHTS.

We do not question the right of a state supreme court to discipline, and where otherwise appropriate, disbar an attorney. Notwithstanding recent attempts by this Court to necessarily and properly suggest constitutionally mandated limitations upon the exercise of this right by state courts, the fact remains state courts, unfortunately relying upon a history of judicial neglect, are not acknowledging basic due process limitations on the exercise of this right to discipline attorneys. "Disbarment In The United States: Who Shall Do The Noisome Work?", 12 Columbia Journal of Law and Social Problems 1, where in general discussion of this issue it is specifically noted:

> "Once again, the lower courts responded by disregarding the *Ruffalo* directive. The Supreme Court of Kansas, for example, held that it is not necessary that the accused attorney be notified of specific charges 'as long as proper notice is given of the basic factual situation out of which the charges might result [*State* v. *Alvey*, 215 Kan. 460, 466, 524 P.2d 747, 752 (1974)]' The additional charge which the Supreme Court found violative of Ruffalo's rights was certainly from the same 'basic factual situation' as the other charges. Informality and discordance of standards have continued in the various jurisdictions as both state and lower federal courts affirmed their power to conduct proceedings as they saw fit, provided that the elusive due process essentials were not denied [cases cited]. It appears that whatever rule *Ruffalo* was meant to set down has been largely ignored." 12 Columbia Journal of Law and Social Problems at 24, 25

More to the point, two Justices of the Illinois Supreme Court (Justice Clark who did not take part in the decision below, and Justice Dooley who recently passed away), in December 12, 1977 dissenting opinions negatively comment on the grossly inequitable system used to discipline Illinois attorneys. *In re Kien*, 69 Ill. 2d 355.

The gravamen of this petition addresses itself to an attorney's right to both substantive and procedural due process incident to a disciplinary, and as is the circumstance in this case, disbarment proceeding.

Although acknowledging that the Attorney Registration and Disciplinary Commission violated its own Rule 81 requiring a hearing on a complaint no later than 90 days after service, and further acknowledging both that the Commission violated, and the court itself refused, to enforce its own Rule 753 requiring an attorney disciplinary complaint be voted on by the Inquiry Board, the Supreme Court of Illinois necessarily concluded that in disciplinary proceedings neither the Commission nor the court were procedurally bound to follow their own rules. This conclusion failed to recognize the adversary, primarily criminal nature of disbarment proceedings. More disservingly the opinion of the Supreme Court of Illinois totally ignores fundamental due process claims and arguments.

Although admittedly much confusion still attains as to what statutory, and more importantly, what constitutional rights an attorney has in a disbarment proceeding (See, 12 Columbia L. Rev. 1 P. 17 fn. 108), the basic premise of this issue was decided by this Court in *In re Ruffalo,* 390 U.S. 544 (1968). In *Ruffalo* this Court unequivocally held an attorney is ". . . entitled to procedural due process (*In re Ruffalo,* p. 550) and that the proceedings ". . . are adversary proceedings of a quasi-criminal nature." (*In re Ruffalo,* p. 551.

Importantly Ruffalo's claim was similar in kind and legally indistinguishable from any one of the specific claims urged by petitioner. (Petitioner's specific due process claims are later discussed.) During the proceedings against him, more specifically after the hearing commenced, the party conducting the hearing added an additional charge, one which the charging parties suggest was supported by the evidence. In acknowledging a disciplinary procedural right to due process this Court in *Ruffalo* concluded that failure to give timely notice of the precise nature of the charges required reversal. As later developed, the procedural due process failures in this case are more egregious and more numerous.

Notwithstanding this lamentable failure to ensure fairness and afford substantial due process by many state courts, [See: Reicht, *"The New Property"*, 73 Yale L.J. 733 (1964)] this basic right has been recognized by federal courts both before and more obviously since this Court's decision in *Ruffalo.*

The Eighth Circuit opinion *In re Noell,* 93 F.2d 5 (8th Cir. 1937), acknowledged an attorney's right to due process in disciplinary hearings.

Since *Ruffalo* the Seventh Circuit has on two occasions acknowledged this right of procedural due process. *In re*

Echeles, 430 F.2d 347 (1970), was remanded by the Seventh Circuit after noting that certain exhibits ". . . were not competent evidence" and ". . . that it would be unfair, after this lapse of time and in the light of intervening circumstances to treat the 1954 conviction as the sole foundation for any suspension or disbarment." (*In re Echeles,* p. 355). In reversing an order suspending an attorney from practicing law, the Seventh Circuit again emphasized the procedural due process limitations on a court's power to discipline an attorney. *In re Ming,* 469 F.2d 1352 (1972). More to the point of this case the court in *Ming,* though acknowledging the right of a court to adopt rules for disciplinary proceedings, citing *Ruffalo,* concluded such "rules must meet the essential requrements of due process." (*In re Ming,* p. 1355) It should naturally follow that if rules must accord the rights of due process, those same rules, where they exist, must be obeyed and complied with.

Related to this point is this Court's decision in *Spevack* v. *Klein,* 385 U.S. 511 (1967), holding an attorney during disbarment proceedings does have the privilege against self-incrimination. And finally and most recently in *Leis* v. *Flynt,* 99 S.Ct. 698 (1979), by way of dicta the Court implies the existence of a constitutionally protected interest in an attorney's right to practice law where that right was "previously held under state law." (*Leis* v. *Flynt,* p. 701)

A brief review of the decisions of this Court relative to somewhat related procedures make it difficult to appreciate the implicit conclusion of the Supreme Court of Illinois that an attorney during disbarment proceedings should be entitled to something less than procedural due process. Although not part of a criminal prosecution and unlike disbarment proceedings not adversarial in nature, we know that even those involved in parole revocation proceedings (*Morrissey* v. *Brewer,* 408 U.S. 471 (1972)) as well as probation revocation proceedings (*Gagnon* v. *Scarpelli,* 411

U.S. 782 (1973)) are entitled to basic due process rights. For that matter, even prisoner administrative procedures are subject to some due process limitations. *Wolff* v. *McDonnell,* 418 U.S. 539 (1974).

The due process rights accorded an attorney during a disciplinary proceeding, particularly one which results in disbarment, should at the least closely approximate those afforded a defendant in a criminal case.

Back in 1824 Chief Justice Marshall in his oft-cited opinion in *Ex parte Burr* noted:

> ". . . the profession of an attorney is of great importance to an individual, and the prosperity of his whole life may depend on its exercise. The right to exercise it ought not to be lightly or capriciously taken from him." *Ex parte Burr,* 22 U.S. 529 (1824).

With similar concern for an attorney's substantive and procedural rights during a disciplinary proceeding the New York Court of Appeals in *In re Eldridge,* 82 N.Y. 161, 167 (1880) said:

> "An adverse decision dooms [the attorney] always to disgrace, and often to poverty and want. His professional life is full of adversaries. Always in front of him there is an antagonist, sometimes angry and occasionally bitter and venomous. His duties are delicate and responsible, and easily subject to misconstruction. To say that when he denies the charges brought against him he may be tried without the rights and the safeguards which belong to the humblest criminal would be to adopt a dangerous rule, and one without reason or justification. The question is important and it is best that we decide it." *In re Eldridge,* p. 167.

And finally the Seventh Circuit, ironically citing and directly quoting from a Supreme Court of Illinois decision, *People ex rel.* v. *Mall,* 354 Ill. 323 (1933), expressed agreement with the observation that: "The disbarment of

an attorney is the destruction of his professional life, his character, and his livelihood." *In re Fisher,* 179 F.2d 361, 370 (1950). *Fisher* further cites and quotes the language of this Court in *In re Secombe,* 19 How. 9 (1856) relative to the disciplinary proceeding rights of attorneys:

> "The power, however, is not an arbitrary and despotic one, to be exercised at the pleasure of the court, or from passion, prejudice, or personal hostility; but it is the duty of the court to exercise and regulate it by a sound and just judicial discretion, whereby the rights and independence of the bar may be as scrupulously guarded and maintained by the court, as the rights and dignity of the court itself." *In re Secombe,* 19 How. 9, 13 (1856).

We respectfully suggest this Court give unequivocal direction and guidance to all of the lower courts, stating specifically the importance and extent of an attorney's substantive and procedural rights incident to defending against disciplinary charges. We further request those rights be liberally stated.

B. AT THE VERY LEAST THE DUE PROCESS CLAUSE REQUIRES THAT STATE COURTS IN ATTORNEY DISCIPLINE CASES ABIDE BY AND FOLLOW THEIR OWN PROMULGATED RULES.

At the very foundation of the concept of procedural due process is adherence to those rules or procedures promulgated to adjudicate disputes. Courts in administering and adjudicating relative to the rights of attorneys to practice law should, and we would urge must, adopt—and scrupulously follow—the highest of standards so as to contribute to the integrity of the judicial process.

Speaking generally on the subject of procedural due process by way of dissent in a rights of alien case, Mr. Justice Jackson stated:

"Procedural fairness, if not all that originally was meant by due process of law, is at least what it most uncompromisingly requires. Procedural due process is more elemental and less flexible than substantive due process. It yields less to the times, varies less with conditions, and defers much less to legislative judgment. Insofar as it is technical law, it must be a specialized responsibility within the competence of the judiciary on which they do not bend before political branches of the Government, as they should on matters of policy which compromise substantive law. . . . Only the untaught layman or the charlatan lawyer can answer that procedures matter not. Procedural fairness and regularity are of the indispensable essence of liberty." *Shaughnessy* v. *United States,* 345 U.S. 206, 224 (1953)

SPECIFIC FAILURES TO COMPLY WITH PROMULGATED RULES AND REGULATIONS.

It is uncontradicted in the record that the Commission knowingly and purposely violated its own rule (Commission Rule 8.1) by denying petitioner a hearing within the mandatory 90 day period. Also, again uncontradicted by the record, the Commission knowingly and purposely violated a rule of the Supreme Court of Illinois (Rule 753) by failing to have and require the members of the Inquiry Board vote on the complaint.

These omissions were compounded by the Supreme Court of Illinois who in somewhat cavalier fashion—again premised upon its refusal to acknowledge petitioner's right to fundamental due process—concluded that it was not in any way limited to observing, or as we would more properly suggest enforcing, the rules of the Commission which it created. (The Supreme Court of Illinois has adopted the predatory view that it will not follow the doctrine of *stare decisis* in ruling on attorney discipline cases. *In re Nesselson,* 35 Ill. 2d 454 (1966).) Interestingly, the court below

allowed as that the Commission's rules were intended to give ". . . due regard . . . [to] the rights of the attorney under investigation. *In re Mitan,* 75 Ill. 2d 118, 125 (1979).

As to its own rule requiring the members of the Inquiry Board vote on the complaint, the court below dismissed this omission as being merely "technical," and in so doing gave the court's approbation to an act in violation of the court created limitations placed upon the Commission's authority.

The above conclusion of the Illinois Supreme Court that petitioner's contentions were merely technical is belied by a reading of the rules and the record below. As the court itself observed, Rule 753 was intended ". . . to prevent the Administrator from acting solely on his own in an arbitrary or dictatorial manner." *In re Mitan,* 75 Ill. 2d 118, 126 (1979). Further the court observed the importance of having the Inquiry Board consider *all of the facts. In re Mitan,* 75 Ill. 2d 118, 126 (1979). Obviously the Inquiry Board was intended to act in much the same way as a grand jury—to determine probable cause and thus require an individual to defend against charges.

We are certainly not merely arguing form without regard to substance when we again call attention to the fact that the Inquiry Board dismissed the initial complaint because it violated the rules of the Commission. Should not the fact of that dismissal, and more importantly the fact that the Commission's rules had been violated, have been specifically considered by the Inquiry Board were it to have been asked to issue a new complaint? These important intervening factors—certainly factors of concern to one educated in the law—may have, as they should have, created some question as to the legal propriety and fairness of returning a second complaint.

Referring back to our grand jury analogy, certainly if a criminal indictment properly returned by a grand jury

were to be dismissed, the prosecutor could not merely reissue the indictment. (The proceedings here were quite similar to those held violative of the Due Process Clause by the Pennsylvania Supreme Court in *In re Schlesinger*, 172 A 2d 835 (Pa. 1961), where the prosecution and adjudicating functions were merged together.) Rather—as specifically required by Rule 753—the prosecutor (and as we contend here, the Administrator)—would have to have any subsequent indictment again considered by the grand jury. Surely even lay jurors would inquire and be concerned with the reasons the indictment was dismissed. That concern—which is the gist of this argument—could not and should not be dismissed as a technical requirement, particularly where as here intervening facts would of necessity have to be considered to properly justify the assumption that they, the charging party, considered *all of the facts* and were in a position to fairly exercise their discretion. The discretion created by Rule 753 was in the Inquiry Board and purposely not in the Administrator or subject to waiver by the court.

It is important to note that the prestigious American Bar Association Special Committee on Evaluation of Disciplinary Enforcement chaired by former Justice Tom C. Clark, in its 1970 report entitled Problems and Recommendations in Disciplinary Enforcement, stressed the importance, in disciplinary proceedings, of an investigative and *screening* procedure and an *inquiry to determine probable cause.* (Clark Committee 1970 Report at XIV)

It is constitutionally, no less practically, incongruous to suggest, as the Supreme Court of Illinois has, that the Committee and the court may knowingly violate rules intended to protect minimum due process rights. This conclusion is particularly disturbing when we recall and fully appreciate the total immunity from civil liability enjoyed by the court. *Bradley* v. *Fisher,* 13 U.S. 335 (1872).

We respectfully suggest there may well be a serious question as to when the supreme court of a state can delegate its powers to hear and determine disbarment actions, (*In re Bruen,* 102 Wash. 472, 172 Pac 1152 (1918)—holding unconstitutional a State statute granting to the board of law examiners the power to conduct disbarment actions), but that in any event where delegation has been made, as it was in part here, the specific rules of the supreme court relating to that delegation must be scrupulously observed. To do less would totally attenuate the system.

In *United States* v. *Lee,* 106 U.S. 196, 220 (1882) this Court stated: "All officers of the government from the highest to the lowest are creatures of the law, and are bound to obey it."

Much more recently this basic issue of adhering to procedural rules was discussed in some length in *United States* v. *Caceres,* 99 S.Ct. 1465 (1979). We are not unmindful of the majority opinion in *Caceres*—that the violation by IRS agents of Internal Revenue Service Manual Regulations did not require suppression of electronically monitored conversations. Still the dicta of the majority opinion supports the argument we here make in that primary emphasis and reliance was placed upon the fact that the electronic conversation monitoring, absent the IRS Regulations, was specifically constitutionally authorized, and not as here a violation of the Due Process Clause. Further, and again on point, the majority in *Caceres* noted respondent had in no way *relied on* the regulation and that it had no effect on his conduct. Contrast petitioner's status here where he totally relied on and in every way possible asserted the Commission and the Supreme Court of Illinois rules, to the extent of even jeopardizing his right to adequately and totally defend himself.

We distill from *Caceres* the following. Assuming, as we urge, that the rules—i.e., the hearing within 90 days and

the requirement the complaint be signed by members of the Inquiry Board—were (as the Supreme Court of Illinois apparently concedes) intended to afford petitioner basic due process protection, then of course we have, unlike *Caceres*, a constitutional issue. And further, even assuming there to be some question as to the due process nature and intent of these rules, petitioner's reliance, the obvious effect on his conduct, and his substantial suffering as a result of the violation, all serve to at the very least implicate the Due Process Clause.

In *Caceres* both the majority and the dissent cite *Bridges* v. *Wixon*, 326 U.S. 135 (1945). In *Bridges* the Court afforded due process protection to an alien where Immigration Service failed to observe its own rules (requiring signature and oaths) which were intended to serve as safeguards against unfair procedures. Mr. Justice Marshall's dissent in *Caceres* incorporates the following particularly applicable quote from *Bridges*: ". . . this Court has held that 'one under investigation is legally entitled to insist upon the observance of rules' promulgated by an executive or legislative body for his protection." *Bridges* v. *Wixon*, 326 U.S. 135, 152, 153 (1945). (We necessarily assume that the judiciary was not purposely excluded.) Continuing on the dissent states: "Where individual interests are implicated, the due process clause requires that an executive agency adhere to the standards by which it professes its action to be judged." *United States* v. *Caceres*, 99 S.Ct. at 1475. This language captures better than any we might fashion the argument we here raise.

The importance and necessity of following one's own rules and regulations has been recognized in still other cases decided by this Court. In *United States xe rel. Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954) it was held that the regulations of the Attorney General relative to internal

procedures to be followed in the consideration of applications to suspend deportation of an alien have the force of law and must be observed.

In a case which closely approximates the issue raised by the failure of the Inquiry Board to vote to file the complaint, this Court acknowledged the procedural right to have the United States Attorney file an affidavit showing good cause as a condition precedent to instituing denaturalization proceedings. *United States* v. *Zucca*, 351 U.S. 591 (1956).

C. PETITIONER WAS CHARGED WITH AND CONVICTED OF VIOLATING AN ILLINOIS BAR ASSOCIATION DISCIPLINARY RULE WHICH PRIOR TO THIS CASE HAD BEEN RENDERED UNENFORCEABLE BY THE SUPREME COURT OF ILLINOIS.

As far back as *Bradley* v. *Fisher*, 80 U.S. 335 (1871) this Court acknowledged the obvious due process right of an attorney to specific notice of the complaint against him and an opportunity to defend against those charges at a disciplinary hearing. The Court observed: "This is a rule of natural justice and is applicable to cases where a proceeding is taken to reach the right of an attorney to practice his profession . . ." *Bradley* v. *Fisher*, 80 U.S. 335, 354 (1871). In each and every subsequent case decided by a federal court this basic right to fair notice of the specific charges and the right to respond to those charges, has been acknowledged where the issue was properly raised on the facts. (*See, Phipps* v. *Wilson*, 186 F.2d 748 (7th Cir. 1951).

The Commission specifically charged petitioner with falsifying his application for admission to the bar in violation of Illinois State Bar Association Disciplinary Rule 1-101(A). Apart from its other irregularities this was the specific charge upon which evidence was taken and against

which petitioner was required to assert a defense. As appears from the opinion below Disciplinary Rule 1-101(A) was the charge upon which the Illinois Supreme Court authorized the disbarment.

However, by order dated June 1, 1973, the Illinois Bar Association was totally removed from any authority over disciplinary proceedings and accordingly its Disciplinary Rules became unenforceable. Thus, petitioner was tried on and stands convicted of violating a Disciplinary Rule which had no force and effect.

Goldfarb v. *Virginia State Bar,* 421 U.S. 773, 790-792 (1975), indirectly bears upon this issue. In *Goldfarb* this Court held that bar association ethical opinions—which in *Goldfarb* were not approved and here were specifically rejected—cannot be the predicate for state action. It would be anomalous indeed to here hold that a state court could, in the face of a specific rejection of bar regulations, in an arbitrarily selective *ex post facto* manner adopt and rely on those same regulations.

It is obvious that on its face the complaint against petitioner did not state a violation of action proscribed by the Supreme Court of Illinois. The Supreme Court of Illinois has not adopted a proscription similar to Disciplinary Rule 1-101(A) addressed to pre-attorney activities of falsifying an application for admission to the bar. All of the Supreme Court of Illinois proscriptions are directed to activities of an attorney *after* becoming an attorney. Though this point might be of lesser importance were this a purely civil proceeding with authorized notice type pleading, the criminal or quasi-criminal nature of the action obviously required accurate specificity. (*See, Palmer* v. *City of Euclid,* 402 U.S. 544 (1971))

D. PETITIONER'S FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION WAS VIOLATED.

Though certainly not of lesser importance, this argument is asserted last only because it is specifically based upon the Fifth Amendment protection against self-incrimination. Though this right is asserted through the Due Process Clause of the Fourteenth Amendment, (*Malloy* v. *Hogan,* 378 U.S. 1 (1964)), Fifth Amendment considerations prevail.

In *Spevack* v. *Klein,* 385 U.S. 511 (1967), in specifically reversing *Cohen* v. *Hurley,* 366 U.S. 117 (1961), this Court stated that the Self-Incrimination Clause of the Fifth Amendment ". . . extends its protection to lawyers as well as to other individuals, and that it should not be watered down by imposing the dishonor of disbarment and the deprivation of a livelihood as a price for asserting it." *Spevack* v. *Klein,* 385 U.S. at 1627.

Spevack involved both a requirement on the attorney that he testify and that he, pursuant to *subpoena duces tecum,* produce certain of his records. In acknowledging the attorney's Fifth Amendment right the Court held his silence could not be used against him as evidence of guilt and there could be no ". . . compulsory production of books and papers of the owner . . .". *Spevack* v. *Klein,* 385 U.S. at 515.

Notwithstanding the clear limitations spelled out in *Spevack* the Supreme Court of Illinois has adopted and used against petitioner purely civil rules. Rule 6.1 of the Rules of the Attorney Registration and Disciplinary Commission which was employed against petitioner, provides as follows:

> *Scope of Discovery.* Except as hereinafter provided discovery practice and the taking of discovery

and evidence depositions shall be in accordance with the Civil Practice Act and Supreme Court Rules. Written interrogatories shall not be served by any party unless leave is obtained from the Hearing Panel Chairman upon good cause shown. At any time after the respondent has been served with a copy of the complaint and notice of hearing, either party may request admissions of fact and genuineness of documents pursuant to Rule 216. The Clerk of the Supreme Court shall issue subpoenas upon the request of the Administrator or respondent.

Failure to comply with the above rule is by subsequent Rule 7.1 treated as follows:

> *Failure to Answer.* If the respondent fails to answer or otherwise plead to the complaint as required by Rules 5.1 and 5.3 above, the proof required shall be as follows:
>
> (1) in the event a respondent who has been personally served fails to answer, the allegations of the complaint shall be deemed admitted but the Hearing Panel in its discretion may require proof of any or all of such allegations;
>
> (2) in the event the service of the complaint and notice of hearing on the respondent has not been personal, the allegations of the complaint shall not be deemed admitted, the Hearing Panel shall proceed with the hearing and proof of such allegations.

We respectfully suggest that the use of these rules—which far exceed merely requiring an attorney to plead guilty or not guilty or stand mute—violate the requirements of *Spevack,* and fail to accord with the *In re Ruffalo,* 390 U.S. 591, 551 (1968) characterization of these proceedings as being adversary and of a quasi-criminal nature.

CONCLUSION

For the reasons argued in this petition, whether considered individually or more properly in their cumulative effect, we respectfully urge this Court issue a writ of certiorari to review the opinion and judgment of the Supreme Court of Illinois.

Respectfully submitted,

MARTIN S. GERBER

August 17, 1979

APPENDIX

APPENDIX

Docket No. 50594—Agenda 15—September 1978.
In re W. JASON MITAN, Attorney, Respondent.

MR. JUSTICE RYAN delivered the opinion of the court:

In this attorney discipline matter we must decide two issues. Is Rule 8.1 of the Attorney Registration and Disciplinary Commission (Ill. Rev. Stat. 1977, ch. 110A, following par. 770), which states that a hearing shall commence on a complaint within 90 days of service, mandatory or directory? Second, should a licensed attorney who made several false statements on his application for admission to the bar of this State be disciplined and, if so, to what extent?

On February 4, 1976, the Administrator of the Attorney Registration and Disciplinary Commission filed a complaint, which had been voted by the Inquiry Board, alleging that respondent had deliberately made false statements on his sworn questionnaire and his sworn supplemental questionnaire filed with the Committee on Character and Fitness. The complaint was served on respondent on February 6, 1976, and a date for appearance before the hearing panel was set for May 19, 1976, a date 103 days after service. On February 25, 1976, respondent requested a continuance, which was denied although additional time to answer was given, and then on March 10, 1976, and again on April 9, 1976, filed answers to the complaint. On May 16, 1976, two days before the date set for the hearing, respondent moved to dismiss the complaint on the ground that the hearing had not commenced within 90 days of service as specified in Rule 8.1 of the Attorney Registration

and Disciplinary Commission. The motion to dismiss was granted on May 18, 1976, without prejudice to the Administrator to file a new complaint. The Administrator filed an identical complaint on May 20, 1976; this second complaint was not voted by the Inquiry Board as specified in our Rule 753(a) (58 Ill. 2d R. 753(a)). Service of this second complaint has had on the respondent. He was also served with a "Request to Admit Facts and Genuineness of Documents" (Request) pursuant to our Rule 216 (58 Ill. 2d R. 216). Technical objections to service made by the respondent delayed the proceedings until January 1977. On several occasions in January 1977 respondent filed motions objecting to the form and content of certain paragraphs in the Request; he made specific denials to only three paragraphs. The hearing panel overruled these objections, and on January 25, 1977, when no admission or denial was filed by the respondent, deemed the allegations admitted. Though respondent was not personally present at the hearing, his counsel did not stand exclusively on procedural points but objected vigorously to admission of each item of the Administrator's evidence and in closing argument dealt extensively with the alleged misconduct itself.

As to the substantive matters of the complaint, the Administrator presented substantial evidence supporting his allegations that the respondent made numerous false statements and deliberately failed to disclose certain information in the sworn questionnaire and statement filed with his July 14, 1972, application for admission to the Illinois bar. These false statements and omissions were reiterated in an April 9, 1974, supplemental questionnaire in which the respondent indicated that there were "no changes" in most areas of the questionnaire; numerous questions were marked "same."

The hearing panel and the Review Board found that the respondent had made nine specific and material misrepresentations. Respondent did not disclose at least four of his previous addresses and falsely stated his birthday to be May 18, 1943, when, in fact, his birthday is May 18, 1938. He did not disclose that his name at birth was Walter James Mitan and that it was changed by court order on May 1, 1972, to W. Jason Mitan. In response to a direct question he gave no information regarding a previous marriage and he did not disclose details of a subsequent divorce. Respondent answered in the negative questions about attendance at law schools other than the one from which he received his degree and application for admission to other State bars; in fact, he attended John Marshall Law School as an "auditor" and applied for admission to the bar of Pennsylvania. Respondent did not disclose at least five previous employers and occupations. Respondent also denied involvement in any prior civil or criminal proceedings when, in fact, he had been involved in several civil suits, had been arrested three times, and had pleaded guilty and had been convicted of a felony confidence game.

The hearing panel and the Review Board recommended that the respondent be disbarred.

Before reaching the substantive aspects of the Administrator's complaint, respondent urges that we hold that two technical errors in the proceedings below stripped the hearing panel of its authority to recommend discipline: a hearing was not held on the first complaint within 90 days of service as specified in Rule 8.1 of the Commission; and, the second complaint filed by the Administrator was not voted by the Inquiry Board, as required by this court's Rule 753(a).

Rule 8.1 is not a rule of this court but is a procedural rule of the Commission which it is authorized to promulgate by our Rule 751(a), which provides that the Commis-

sion shall have the duty "(a) To make rules for disciplinary proceedings not inconsistent with the rules of this court" (58 Ill. 2d R. 751(a)). This court has the inherent power to regulate the admission of attorneys to the practice of law and to discipline attorneys who have been admitted to practice before it. The disciplining of attorneys is in the nature of an original proceeding in which the Attorney Registration and Disciplinary Commission and its various officers, as well as the Inquiry Board, the hearing panel and the Review Board, serve only as agents of this court in administering the disciplinary functions that have been delegated to them. (*In re McCallum* (1945), 391 Ill. 400, 419; *In re Reynolds* (1965), 32 Ill. 2d 331, 336; *In re Czachorski* (1969), 41 Ill. 2d 549.) The findings and recommendations of the hearing panel and the Review Board, although entitled to virtually the same weight as the findings of any trier of fact, are nonetheless not binding on this court but are advisory only (*In re Hallett* (1974), 58 Ill. 2d 239; *In re McCallum*). This court has held that because of the nature of the proceedings before those to whom we have delegated the authority to act, we will not consider technical objections as to the practice and procedures before them, nor can such technical objections bind us or limit our authority to act. *In re Czachorski; In re Yablunky* (1950), 407 Ill. 111.

Rule 8.1 of the Attorney Registration and Disciplinary Commission provides:

> "Except in extraordinary circumstances, the hearing on the complaint shall commence before the Hearing Panel no later than 90 days after service of the complaint upon the respondent." (Ill. Rev. Stat. 1977, ch. 110A, following par. 770.)

The respondent asks us to hold that this rule sets forth a mandatory statute of limitations, a limitation which would effectively bar this court from sanctioning an attorney

merely because of an inadvertent administrative error committed by the Administrator's office. This we will not do. Our Rule 753(c) requires only that the Hearing Board shall set a date for hearing on a complaint not earlier than 21 days after the filing of such complaint and that a copy of the same and a notice of the date for hearing must be served on the respondent attorney not less than 14 days prior to the date set for hearing. Our rule states no limitation on the length of time between the filing of the complaint and the hearing. Rule 8.1 of the Commission must be viewed not as a limitation on the authority or jurisdiction of this court, but as a procedural rule of the Commission directing the Administrator to conduct orderly and timely proceedings with due regard for the rights of the attorney under investigation. The rule promotes prompt action.

The hearing panel properly exercised its discretion in dismissing the complaint without prejudice to the Administrator to file a new complaint. The time limitation is not mandatory, and it cannot be construed, as respondent urges, to be a means of implementing a right to a speedy trial similar to the 120-day provision of the Code of Criminal Procedure of 1963 (Ill. Rev. Stat. 1975, ch. 38, par. 103—5). The failure to comply with the Commission's Rule 8.1 does not deprive this court or its agents of the right or the power to further consider the charges against the respondent.

Respondent's second technical objection to the jurisdiction of this court concerns the Administrator's failure to submit his second complaint to a vote of the Inquiry Board as specified in our Rules 753(a) and (b). The Administrator filed the second complaint, identical to the first, two days after dismissal of the first complaint without prejudice. The second complaint filed by the Administrator con-

tained the same charges and involved the same conduct of the respondent which the Inquiry Board had originally considered sufficient to cause a complaint to be filed. The order of dismissal simply preserved whatever procedural benefits Rule 8.1 accorded to the respondent by requiring that the hearing date be set within 90 days following the service of the complaint. The order of dismissal was without prejudice to the Administrator to file a new complaint. The filing of a new complaint containing the same charges just two days after the dismissal of the original complaint does not violate our Rule 753(b), which requires that "[a] complaint voted by the Inquiry Board shall be prepared by the Administrator and filed with the appropriate Hearing Board." This second complaint was one which had been voted by the Inquiry Board. The purpose of our Rules 753(a) and (b) is to prevent the Administrator from acting solely on his own in an arbitrary or dictatorial manner. The attorney-respondent is given the protection of having to answer charges only when they have been made by a panel of the Hearing Board which has considered the facts upon which they are based independently of prosecutorial interests of the Administrator. The conduct of the Administrator in this case has not violated or deprived the respondent of this protection.

A pattern of falsehood and deception pervades the respondent's 1972 and 1974 statements and questionnaires submitted to the Committee on Character and Fitness. Viewed alone, each individual falsehood or omission may appear of minor consequence; together, however, the responses present evidence of a calculated effort by the respondent to frustrate any meaningful examination and investigation of the applicant's fitness to practice law. Though some of respondent's explanations seem at least plausible (secretarial typing error; merely audited law school courses without credit), others strain credulity

(psychologically blocked out unpleasant memories of unpleasant marriage and divorce; arrests not reportable if not followed by conviction). These attempts at rationalizing respondent's conduct do not disguise the obvious falsehoods. But for the felony conviction, respondent would probably have been admitted to practice had he originally told the Committee everything he tells us now; even the conviction itself would not necessarily and automatically preclude admission. (*People ex rel. Deneen v. Coleman* (1904), 210 Ill. 79, 80-81.) Even though we might accept respondent's explanation that mere inadvertence caused all of these falsehoods and omissions, we must, nonetheless, adhere to our recent holding that a bar applicant has a duty to accurately state matters contained in an application for admission. (*In re Martin-Trigona* (1973), 55 Ill. 2d 301.) The Illinois Code of Professional Responsibility, Disciplinary Rule 1—101(A) (1970)—violation of which may subject an attorney to discipline (*In re Hallett* (1974), 58 Ill. 2d 239)—and several early cases recommend sanctions for concealing prior convictions and making materially false statements in the bar application. (*People ex rel. Healy* v. *Propper* (1906); 220 Ill. 455; *People ex rel. Deneen v. Gilmore* (1905), 214 Ill. 569; *People ex rel Deneen v. Hahn* (1902), 197 Ill. 137 (all cases recommend disbarment).) These cases hold that the concealment of a prior conviction constitutes a fraud upon this court and warrants discipline. Recent cases from other jurisdictions also recommend disbarment for such conduct. *Florida Board of Bar Examiners v. Lerner* (Fla. 1971), 250 So. 2d 852; *In re Howe* (N.D. 1977), 257 N.W.2d 420; *In re Elliott* (1977), 268 S.C. 522, 235 S.E.2d 111.

The concealment of the respondent's prior conviction, as noted in the cases cited above, constituted a fraud on this court which, as the earlier cases from this State and

the cases cited from other jurisdictions held, is conduct of such a serious nature as to warrant disbarment. When we consider also the respondent's false and deceptive answers to other questions, we conclude that the discipline recommended by the hearing panel and the Review Board is warranted. It is therefore the order of this court that the respondent be disbarred.

Respondent disbarred.

WARD and CLARK, JJ., took no part in the consideration or decision of this case.